IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.205 OF 2006

M/s.Getax Australia Pty.Ltd. Petitioner

versus

M/s.Swarup Group of Industries Respondents

Mr.Rahul Narichania a/w Gautam Bhatikar i/by Mulla & Mulla for petitioner.

Mr.S.U.Kamdar, Sr.Counsel with Sushma Joshi i/by M/s.Haresh Mehta & Co. for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 3rd July 2006

PC :

1. Heard Shri Narichania for the petitioner and Shri Kamdar for respondents.

2. The petitioner has invoked this Court’s jurisdiction under Arbitration & Conciliation Act, 1996 and more particularly seeking interim measures in terms of securing the amount in dispute in the Arbitration.

3. Shri Narichania submits that the petitioner

is an Australian Company and incorporated under the laws of Australia. It has entered into an Voyage Charter with the respondent on 6th September 2004. It is not anybody's case that the Charter Party Agreement does not contain an Arbitration clause. However, merits of the claim according to the petitioner, are not being disputed in the light of the fax message addressed by the respondent to the agents of petitioners, where the claim is virtually admitted. The petitioners place reliance upon copies of the E-Mails which are Exhibit-C to the petition. It is then submitted that the loading of the Vessel was delayed at the port. However, the voyage reconciliation statement submitted on 18th October 2004 showed an amount of US $ 87,277.47 as balance due to the petitioner.

4. It is this amount which is claimed as not paid by the respondent. That led to the arbitration proceedings. In para 2(i), the petitioners state thus :-

> "2(i) As no payment was received from the Respondent on the expiry of the notice period, the Petitioner accordingly appointed, Mr.John Maskell, vide its letter dated 23rd February 2005, as the Sole Arbitrator as per the provisions of

> clause 19(a) of the said charter party, which appointment was accepted by the said Arbitrator vide his letter of Acceptance dated 23rd February, 2005. Hereto annexed and marked EXHIBIT "I" is a copy of letter of Appointment of Mr.John Maskell as Arbitrator by the Petitioner dated 23rd February 2005 and EXHIFBIT "J" is a copy of the Letter of Acceptance of appointment as Arbitrator dated 23rd February 2005."

5. The sole arbitrator has been appointed and the submission of Shri Narichania is that the respondent vide their advocate’s letter offers to settle the petitioner’s claim at 50% of the amount. The letter is dated 23rd February 2005.

6. Shri Narichania contends that once the offer contained in the letter dated 23rd February 2005 has been accepted by the petitioner and they are agreeable to the full and final settlement of their claim for an amount of US $ 80,000/- as also the respondent confirming this settlement and making part payment, a strong prima facie case is made out for seeking abovementioned interim measure.

7. He submits that the amount has been paid in part. Later on there is a default. The petitioners have come across a news report wherein serious allegations have been made

against the Chairman of the respondent company. There is an on-going dispute with the National Agricultural Produce Marketing Federation (NAPHED). The said Federation was to receive a sum of Rs.230 crores. Further, there are criminal proceedings pending. There is a likelihood of the assets of respondents being frittered away because there is huge claim of the bankers against petitioner.

8. Although no affidavit has been filed upon notice, the respondents have appeared and Shri Kamdar appearing for them while denying the averments and disputing the correctness of the contents of the new report, has invited my attention to the averments in support of this application. He submits that each of the letters have been addressed without prejudice. It is not as if the respondent has no defence to the claim on merits. On the other hand, to show their bona fides, an offer was made and some amount has been deposited. That apart, according to him, for invoking the interim measures, the tests are settled. Such interim measures are in the nature of attachment of properties before judgement and a Division Bench of this Court has already held that although exercise of power under this

provision is strictly not controlled by Order XXXVIII of CPC, but the Court must be guided by the same while considering the application.

9. In his submission, by merely relying upon a news report and that too appearing some time in January 2006, any relief today, cannot be sought. It is a vague plea which is unsubstantiated by any material other than the news item and such drastic orders cannot be passed when arbitration proceedings are pending.

10. Having heard learned counsel and perused the petition with their assistance, in my view, as of now, no case is made out to invoke this Court's jurisdiction under section 9(2)(b) of the Act.

11. It is well settled by a Division Bench decision of this Court that I am not bound by but should be guided by the provisions for Attachment before Judgement contained in Order XXXVIII of the CPC while considering such application. In National Shipping Co. of Saudi Arabia Vs. Sentrans Industries Limited, reported in AIR-2004-Bom-136, at para 10 the Division Bench observes thus :-

"10. Section 9 in the Act of 1996 is a substantive provision which empowers the Court to pass an interim order before or during arbitral proceedings or any time after the making of the arbitral award but before it is executed under Section 36. Since we are concerned with Section 9(ii)(b), it may be noticed that it provides for an interim measure of protection for securing the amount in dispute in the arbitration. Sort of clarification it also provides that the Court shall have the same power for making orders as it has for the purpose of and in relation to pay proceeding before it. Such provision as enacted in Section 9 is a provision that enables a party to apply for interim protection if action of the other party to the agreement providing for arbitration is either in breach of the terms of the agreement or is inequitable, unfair or in breach of natural justice. The order under Section 9(ii)(b) is in the nature of interim protection order. In a special provision of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is. The legislature while enacting Section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the Civil Procedure Code as it is. It is true and as has been held by the Supreme Court in ITI Ltd. (AIR 2002 SC 2308) that for want of specific exclusion of the Code of Civil Procedure in the Act of 1996, it cannot be inferred that the Code was not applicable but that would not mean that provisions of Code have to read into as it is when the Court exercises its powers as prescribed in the Act of 1996. The procedural aspects provided in the Code about which the Act of 1996 is silent, needless to say, when the Court exercises its substantive power under the Act of 1996 shall be applicable but the guiding factor for exercise of power by the Court under Section 9(ii)(b) has to be whether such order deserves to be

passed for justice to the cause. The provisions of Order 38, Rule 5, C.P.C. cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the arbitration before or during arbitral proceedings or at any time of making of the arbitral amount but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised ex debitio justitiae and in the interest of justice. The Court while considering the application for interim protection under Section 9(ii)(b) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order contemplated under Section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the arbitral tribunal and to ensure that the award passed by arbitral tribunal is capable of enforcement. Though the power given to the Court under Section 9(ii)(b) is very vide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Arbitrator is in a position to get the fruits of such adjudication and in executing the award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the arbitral tribunal may not be able to execute the

> award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under Section 9(ii)(b). The party seeking protection order under Section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under Section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the award, though as indicated above, the provisions of Order 38, Rule 5, C.P.C. are not required to be satisfied. The statutory discretion given to the Court under Section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under Section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Civil Procedure Code cannot be read as it is and imported in Section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure. Each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience. the power of the Court under Section 9(ii)(b) cannot restricted to the power conferred on the Court under Civil Procedure Code though analogous principles may be kept in mind."

None dispute that this is a serious matter. The pleas that the assets and properties are being frittered away or that they would not be available in order to meet the ultimate claim which may be awarded by the Arbitrator have to be

supported by reliable materials. It cannot be mere apprehension. A news report relied upon and that too of January 2006 is hardly a material in my view. So also, the correspondence which is made subject matter of this application is of February 2005. There is nothing apart from this on record to support the application. A Division Bench of this Court while considering an application for attachment of the property under Order XXXVIII, Rule 5 has observed that mere pendency of proceedings against defendants, is no ground to invoke this drastic power (See AIR-2002-Bom-203 - Saraswat Co-op. Bank Ltd. Vs. C.M.Shah - para 24) Shri Narichania has relied upon the fact that no affidavit in reply is filed to this petition. However, it is well settled that burden is on the petitioner to show by cogent and satisfactory material, that an order of security should be made and in default of furnishing of the same, the property be attached. In my view, the material which is in the form of a news report, hardly meets the tests laid down in the aforementioned decisions. Besides this, Mr.Kamdar has pointed out that the claim of NAFED has been cleared to the extent of Rs.100.00 crores. In my view, the plea that without prejudice proposal after acceptance is

conclusive and binding has to be decided bearing in mind the principles laid down in a decision of the Supreme Court reported in AIR-2004-SC-1330 (Chairman and M.D. N.T.P.C. Ltd. Vs. M/s.Reshmi Constructions, Builders and Contractors). That is for the Arbitral Tribunal to decide and cannot be adjudicated upon at this stage.

12. Shri Narichania alternatively submitted that this is a fit case where the respondent should be directed to disclose on affidavit the latest financial position and availability of assets and properties. Shri Narichania relies upon judgement of a learned Single Judge (D.K.Deshmukh, J.) to support this plea and submission. That decision also is rendered while considering an application under Order XXXVIII of the CPC.. It is in that context and taking cognizance of such application that this Court issued direction to disclose the assets and properties by filing an affidavit. Needless to state that said directions were issued in the facts and circumstances of that case. It may be true that it is open for the Court to issue such directions, but, in my view, in the facts and circumstances of present case, that direction

also cannot be issued.

13. In the result, the Arbitration Petition fails and is accordingly dismissed. However, this order does not prevent the petitioners from taking out appropriate proceedings and claiming the relief sought in this application after placing necessary and relevant materials in accordance with law. It is equally open to them to seek a direction for disclosure of assets and properties at a later stage and neither this order nor observations made therein, shall constitute a bar in invoking this Court’s jurisdiction or seeking appropriate interim measures in the pending arbitration proceedings before the arbitrator.

(S.C.DHARMADHIKARI, J.)